Supreme Court, U.S.
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NO. 88-1584

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1989

ALASKA PACIFIC INC.
Petitioner,
-against-

THE UNITED STATES,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

A.

WHETHER A NEW SECOND CAUSE OF ACTION WAS CREATED BY THE UNFORESEEABLE INTERVENING SUPERCEEDING CONCURRING BREACH OF A STATUTORY DUTY BY THE BLM IN DECEMBER 1983

B.

WHETHER THE the USA SHOULD BE ESTOPPED FROM RAISING THE STATUTE OF LIMITATIONS AS A DEFENSE SINCE THE AFFIRMATIVE CONDUCT BY THE BLM NOT ONLY CONSTITUTES EQUITABLE ESTOPPEL BUT ALSO CREATED A NEW CAUSE OF ACTION FOR PROMISSORY ESTOPPEL IN DECEMBER 1983 WHEREBY THE APPELLANTS

JUNE 1985 LAW SUIT AGAINST THE USA WAS FILED TIMELY.?.

C.

WHETHER THE CUMULATIVE EFFECT OF FEDERAL LAND POLICY AND MANAGEMENT ACT AND THE BLM'S FAILURE PROPERLY TO RECORD THE TENDERED DOCUMENTS IN 1979. AND THE AFFIRMATIVE MISCONDUCT OF THE BLM TO PROPERLY FILE AS OF OCTOBER 17, 1979 NUNC PRO TUNC THE SECOND SUPPLEMENTAL DOCUMENTS SUBMITTED IN 1983 AT THE BLM'S INSTANCE AND THE LOCKE DECISION ALL COUPLED TOGETHER EFFECTED A COMPENSABLE TAKING UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

STATEMENT PURSUANT TO RULE 28.1

The corporation is insolvent. All the assets and this cause of action has been assigned to Gregory J Chachas, counsel of record in this petition, as trustee for all of the shareholders in the exact percentage of their previous positions in Alaska Pacific Inc. as it existed before it was insolvent. After the assignment of said cause of action to Gregory J Chachas , as Trustee, the corporation "shell" was merged into a bullion company named Moorgate Inc. which has no interest at all in this cause of action . Gregory J Chachas, the trustee, and the attorney is holding all the interests of all the stockolders of Alaska Pacific inc.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i
STATEMENT PURSUANT TO RULE 28.1 iii
TABLE OF CONTENTS iv
TABLE OF AUTHORITIES v
OPINIONS BELOW 2
BASIS OF JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3
STATEMENT OF CASE 4
ARGUMENT 8
ANALYSIS 9
CONCLUSION 36

TABLE OF AUTHORITIES

cases page

Washington Chromium Co., IBLA 81-1004
Dec 23 1981 , 60 IBLA 378.....10,14,15,23
United States v. Locke....105 S.Ct. 1785 6--36
Logan v. Zimmerman Brush 455 U.S 422.....32
Ruckelhous v. Monsanto Co. 104 S.Ct.2862.....32
Atlantic Richfield v Hickel 432 F 2nd 587 21
Wagner v. Director, Federal Emergency Mgmt,
Agency 847 Fed 2nd 515 (9th Cir 1988).....32
Hugh v. Washington , 88 S. Ct. 438 (1987).....12
Dunlop v.U.S. 165 U.S. 486.....11,16
Ute Indian Tribe v. Probst 428 F 2nd 391 18
Brandt v. Hickel 427 F.2nd 53.. 21
U.S. v. Georgia Pacific Co 421 F.2nd 92 21
Alexander v. Richardson 451 F 2nd1185.....18

Freese v. United States 639 F 2nd 754 30

Archambault v. U.S. 224 F. 2nd 925 17

Skaw v. U.S. 740 F 2nd.932 30

Yuba Goldfields Inc. v. U.S. 723 F. 2nd 884.....30

.U. S. v. Certain Parcels ....131 F. Supp 65.....21

Zuni Tribe v. U.S. 12 Cl. Ct. 641.....32

Reg., Stat. & Const.

43 U.S. C. #1701-1784 (1982).....3. 6, 10.12

28 U.S.C. #1254 (1).....3

Fifth Amendment to the Constitution.....16.24.34

Treatises

Restatement on Torts -(2nd) . # 440.....34

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ALASKA PACIFIC INC.
Petitioner,
-against-

THE UNITED STATES.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner, Alaska Pacific Inc petitions for a Writ of Certiorari to review the judgment of the Ninth Circuit Court entered in this matter on April 19, 1989.

OPINIONS BELOW

The opinions of the Federal District Court of Nevada was reported at CV LV 85 1016 RDF and appears in Appendix A 3 to A 40 thereto. The opinion of the Ninth Circuit Court of Appeals # 88-1584 simply adopts the reasoning of the Federal District Court of Nevada and is unpublished. It appears in Appendix A-41 hereto.

BASIS OF JURISDICTION

The opinion of the Ninth Circuit Court of Appeals, affirming the Federal District Court of Nevada, was rendered April 19, 1989. No Petition for rehearing was filed.

The Court's jurisdiction is invoked under 28 U. S. C. paragraph 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Federal Land Policy and Management Act of 1976, 43 U.S.C. ** 1701-1784 (1982) ("FLPMA"), subject matter jurisdiction, promissory estoppel, and the taking and procedural due process provisions of the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The appellant contends that the court has subject matter jurisdiction for a number of reasons. First, because a new second cause of action was created by the unforseeable superceeding or concurring breach of a statutory duty by the BLM in December of 1983 . Thus the required adminstrative claim and law suit were filed well within the two-year deadline . Therefore this court should reverse the Ninth Circuit Court which affirmed the Federal courts dismissal of the appellant's law suit for lack of subject matter jurisdiction.

Secondly, the court has subject matter jurisdiction because the government should be estopped to raise the statute of limitations on the appellants first and earlier cause of action The affirmative misconduct by government officials in failing to record documents required by the Federal Statute styled FLPMA . and failing to follow the Washington Chromium Co decision and other important administrative mandates thereby lulling the appellant into believing all was well and thereby, precluding the appellant from filing a timely lawsuit in 1983 also require this Court to grant relief on the basis of promissory estoppel and reverse the Ninth Circuit Court of Appeals which confirmed the

Federal District's Court's erroneous dismissal of the appellant's complaint

On October 1979, appellant tendered the documents evidencing ownership of the Pioneer Unpatented Mining Claims to the Reno Office, Bureau of Land Management. Those documents were received but were not timely recorded. In 1976, Congress enacted the Federal Land Policy and Management Act, supra, which required the filing of the documents or failure to do so would raise a conclusive presumption of abandonment. United States v. Locke, supra. Id. 1795. However, it was not the FLPMA which deprived the appellant of its property. It was the failure of the Bureau of Land Management to timely and properly record

documents which caused the property rights to be extinguished. The omission was not occasioned by appellant but by the appellee.

Notwithstanding these facts, B.L.M. again, on December 13, 1983, acknowledged receipt of documents evidencing ownership of the Pioneer Claims, N MC 291839-291861 by appellant and requested that a $5.00 filing fee, per claim. Appellant complied with that requirement by tendering the required fees which B.L.M. accepted .

On April 1, 1985, the United States Supreme Court decided the case of United States v. Locke, 471 U.S. 84 (1985), and held that under the Federal Land Policy and Management Act, 43 U.S.C. 1701, et seq.

(1982) FLPMA, a failure to record unpatented mining claims on or before October 21, 1979 renders those claims null and void.

ARGUMENT

A.

WHETHER A NEW SECOND CAUSE OF ACTION WAS CREATED BY THE UNFORESEEABLE INTERVENING SUPERCEEDING BREACH OF A STATUTORY DUTY BY THE BLM IN DECEMBER 1983 ?

B.

WHETHER THE USA SHOULD BE ESTOPPED FROM RAISING THE STATUTE OF LIMITATIONS AS A DEFENSE SINCE THE AFFIRMATIVE CONDUCT BY THE BLM NOT ONLY CONSTITUTES EQUITABLE ESTOPPEL BUT ALSO CREATED A NEW CAUSE OF ACTION FOR PROMISSORY ESTOPPEL IN DECEMBER 1983 WHEREBY THE APPELLANT'S JUNE 1985 LAW SUIT AGAINST THE USA WAS FILED TIMELY?

C.

WHETHER THE CUMULATIVE EFFECT OF FEDERAL LAND POLICY AND MANAGEMENT ACT AND THE BLM'S FAILURE PROPERLY TO RECORD THE TENDERED DOCUMENTS IN 1979, AND THE AFFIRMATIVE MISCONDUCT OF THE BLM TO PROPERLY FILE AS OF

OCTOBER 17, 1979 NUNC PRO TUNC THE SECOND SUPPLEMENTAL DOCUMENTS SUBMITTED IN DECEMBER 1983 AT THE BLM'S INSTANCE AND THE LOCKE DECISION ALL COUPLED TOGETHER EFFECTED A COMPENSABLE TAKING UNDER THE FIFTH AMENDMENT TO THE U. S. CONSTITUTION?

ANALYSIS

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What is redeemingly important here is that the B.L.M. must follow its own regulations, policies, and decisions.

"The purpose and function of the Fifth Amendment being to secure citizens against governmental expropriation, and to guarantee just compensation for property taken.

What counts is not what the government said it was doing, or what it later says its intentwas, or whether it may have used the

language of a proprietor. What counts is what the government did. Hughes v. Washington, 88 S. Ct.. 438, 389 U.S. 290 (1967)." Id. at pp. 889.

Factually, appellant mailed all required documents, to B.L.M. on October 17, 1979 via certified mail. The Postmaster clearly indicated, by affidavit, that the Certified Mail was in fact delivered to B.L.M. on October 19, 1979. On November 15, 1979, B.L.M. directed a written memo to appellant advising that the 1978 Proof of Labor Forms were not needed at that time (obviously acknowledging that other documents had been accepted and that Proof of Labor forms were not needed). On November 15, 1979,

Placer-Amex, Inc. top filed the Pioneer Claims and "jumped" the area thereby ousting appellant.

Notwithstanding these facts, B.L.M. again, on December 13, 1983, acknowledged receipt of documents evidencing ownership of the Pioneer Claims, N MC 291839-291861 by Last Chance and requested that a $5.00 filing fee, per claim. Appellant complied with that requirement by tendering the required fees which B.L.M. accepted and posted payment.

On April 1, 1985, the United States Supreme Court decided the case of United States v. Locke, 471 U.S. 84 (1985). In Locke, supra, the Court held that under the Federal Land Policy and Management Act, 43 U.S.C. 1701,

et seq. (1982) "FLPMA", a failure to record unpatented mining claims on or before October 21, 1979 renders those claims null and void. Substantial compliance is not enough. Total compliance is the requisite.

The BLM cannot ignore its own Board of Land Appeals decrees and other agency rulings which provide that: Under the Federal Land Policy and Management Act of 1976,

"Where the envelope containing a mining claimant's evidence of annual assessment work required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. S 1744 (1976), addressed to the Oregon State Office, Bureau of Land Management, at its post

office box address in Portland, Oregon, was postmarked in Seattle, Washington, on Dec. 29, 1980, and it is established that whereas in the ordinary course of mail the letter would have been delivered to the state office at its regular post office box prior to 4:15 P.M. on the following day, the last hour for filing such evidence, but that any mail placed in the post office box after 1 p.m. nevertheless would not have been picked up by the state office until a day later, the evidence of assessment work is presumed to have been filed on December 30, even though the date and time stamp of the state office indi-cates that it was not received until 7:30 a.m. on Dec. 31."

See Washington Chromium Co., IBLA 81-1004 (Dec. 23, 1981), 60 IBLA 378.

In Washington Chromium, supra, the Board went on record as to its common sense observations. The Board has this to say:

" Delay problems arising from the transmittal by mail of documents that are required to be filed in a particular BLM office by a specified date are not new, and the rule is well established generally that the deposit in a post office of a letter properly addressed, with duly prepaid postage, creates a rebuttable presumption that the letter was received by the addressee in the ordinary course of mail Dunlop v. United States, 165 U.S. 486, 495 (1897)..

Under Agency decisions, proof of postage and mail, in the ordinary course of the mail raises a rebuttable presumption of mailing and receipt. Evidence of certified mailing and affidavit of proof of delivery presents evidence of a more compelling nature. Agency interpretations and pronouncements by the Secretary and rules promulgated thereby in conformity with FLPMA had the force and effect of law to the same extent as though written into the statute. Archambault v. United States, 224 F. 2d 925 (10th Cir., 1955). Moreover, as Judge Finesilver pointed out in The Oil Shale Corporation, et al. vs- Morton C-8680 (Dec. 19, 1973):

"Construction of an act by the agency charged with its administration

should be given persuasive effect. Ute Indian Tribe, et al. v. Probst.428 F.2d 391 (10th Cir., 1970); Alexander v.Richardson, 451 F. 2d 1185 (10th Cir., 1971)".

Again, in The Oil, Shale, et al., supra, Judge Finesilver made this observation and issued the following admonition:

> " The Department could not, thirty years later, abrogate its announced policy and rules, reverse its direction, and substitute a new national policy completely in conflict with its unswerving prior policy."

In the pending case the doctrine of promissory estoppel creates a cause of action against the USA as of the date the BLM committed affirmative misconduct by not following the statutes requiring the back dating to October 17, 1979, the resubmitted,supplementary and photcopied documents originally received by the BLM in Reno , Nevada on October 17, 1979 .

In order to give the court subject matter jurisdiction and succeed on a promissory estoppel claim the appellant must prove (1) the existence of a promise; (2) that the government expected appellants to rely on the promise by taking definite and substantial action , or forebearing from such action; (3) actual detrimental reliance by

the appellant; (4) that the promise must be enforced to avoid injustice. The above facts establish all the necessary elements.

The BLM knew that the appellant would only forebear from filing suit in 1983 on the condition that the Pioneer claims be reinstated and placed of record pursuant to the FLPMA act. The affirmative misconduct by the BLM date stamping the records as of December 13,1983 instead of stamp dating --- nunc pro tunc, to October 17, 1979 - as required by the Washington Chromium Co. decree and other agency ruling creates a cause of action for promissory estoppel .

The Defendant ,the United States of America, should have been estopped from asserting any defense, denying any acts, whether through malfeasance, misfeasance, or non-feasance of its agents, servants, or employees. Atlantic Richfield Company v. Hickel, 432 F. 2d 587, at 591-592 (10th Cir., 1970) The doctrine of equitable estoppel binding the Government for the conduct of its agents while they are acting within the scope of their employment. was again upheld in United States v. Certain Parcels of Land, 131 F. Supp. 65 (S.D. Cal., 1955). In disputes involving or relating to the administration of public lands, the two (2) controlling cases are Brandt v. Hickel, 427 F. 2d 53 (9th Cir., 1970); and United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir.,

1970). In United States v. Georgia-Pacific, supra, the Ninth Circuit established four elements in determining whether equitable estoppel would apply against the United States, namely; (1) whether the party to be estopped knew the facts; (2) whether he intended that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the person asserting estoppel must rely on the former's conduct to his injury. In Brandt v. Hickel, supra, where the offerors submitted a noncompetitive oil and has lease offer to BLM, that office's statements that "subject offer is hereby held for rejection" and "failure to submit a new offer form will result in the final rejection and closing of the case without further

notice" were ambiguous as to whether the decision was final, thereby denying offerors effective right of appeal and depriving them of due process of law, the Ninth Circuit Court held that the Secretary of Interior was collaterally estopped from disavowing any misstatement.

In December, 1983, the B.L.M. was required to back-date document filings, nunc pro tunc to October 17, 1979. The B.L.M. refused to follow administrative interpretation and the Washington Chromium decision whereby the BLM should have filed and date stamped the documents as of October 17, 1979 when the documents should have been received rather than when the BLM acknowledged

and realized the documents had been received and lost or mislaid but in their possession .

The Federal District Court of Nevada erred, , as did the Ninth Circuit Court of Appeals , in affirming, by incorrectly assuming that the appellant only had a cause of action in 1979 while in fact the second cause of action occured in 1983 when the BLM failed to back date to October 17, 1979 pursuant to the Washington Chromium case the replacements documents received in December 1983 which were received pursuant to the US Postmasters affidavit on October 17, 1979 .

Thus the Federal District Court of Nevada and the Ninth Circuit Court of Appeals, in affirming, erred in dismissing the appellant's suit errroneously believing that the court lacked subject matter not realizing that the appellant had in fact filed its administrative claims in July,1985 well within the two year deadline which began in December 1983,when the BLM finally filed the appellant's 1979 documents and cashed the appellant's check for filing fees.

Prior to the passage of the Federal Land Policy and Management Act of 1976 ("FLPMA"), there was no requirement or procedure for recording these claims with the federal government. FLPMA changed this by requiring the filing of certain

documents concerning claims located prior to the effective date of the Act, as well as documents concerning claims located subsequent to the act--a situation not here in controversy. The stated statutory consequence of noncompliance was the "conclusive abandonment" of the claim(s).

It is the petitioner's position that the requisite documents were timely mailed to the proper office of the Bureau of Land Management but that office failed properly to record these documents. The result was that, under the wording of FLPMA, the claims were conclusively deemed to have been abandoned by the petitioners. Shortly after the deadline for recording pre-1976 claims (actually only about two weeks, Nov.

15, 1979), others located mining claims over the area involved and have proceeded to develop a mine and to remove valuable ore therefrom.

In 1985, this Court held in Locke v. United States, 105 S. Ct. 1785, that FLPMA meant exactly what it said and that failure to have properly recorded mining claims results in their extinguishment.

Between the date that others located claims on the area for themselves, and the Locke decision, it became apparent that the BLM office had received the documents from the petitioners and BLM then attempted, ineffectively however, to rectify the error and to accept, belatedly, copies of

the documents originally tendered but not recorded. By this time, however, the injury had occurred because the new claimant had located mining claims and was, in fact, mining. Subsequently, and after the injury had occurred and had become a chose in action which does not run with the land, the petitioners' predecessor quitclaimed his interest in the area to the new claimants. Since the cause of action for loss of the valuable claims had already occurred, this action simply transferred nothing to the new claimant and did not extinguish any cause of action for injury already incurred.

Thus it is the petitioners' position that although the proper documents were timely mailed to the proper BLM office that the

failure of that office to timely and properly record them--particularly when coupled with the conclusive effect of FLPMA under the Locke decision--was that the claims reverted to the United States, thus permitting others to make mining locations on them, permanently depriving petitioners of their claims and any right to them.

The effect of the error of the Bureau of Land Management was to cause the land to revert to the United States and, in the status then of public domain land, to permit it to be almost immediately relocated by others. It requires no great leaps of logic to recognize that this did accomplish a "taking" by the United States because the interest of the petitioners was extinguished and the

result thereof was that the United States now held the land unencumbered by petitioner's mining claims until relocated by others.

Appellant had unquestionably obtained a vested interest in the Pioneer Claims in that It held vested equitable rights to fee title. Those vested rights were within the protection of the Fifth Amendment prohibition against the taking of property for public use without just compensation. Skaw v. United States, 740 F. 2d 932, 936 (Fed. Cir., 1984); Freese v. United States, 639 F. 2nd 754, 757 (Ct. Cl. 1981). This Court held in Yuba Goldfields, Inc. v. United States, supra, that there need not be a physical invasion and physical restraint for

neither of those acts constituted a sine qua non of a constitutional taking.

The Supreme Court has long held that the Federal Government may not be estopped on the same terms as any other litigant but has stopped short, however, of holding that there are NO cases in which government may not be estopped , particularly where the government's wrongful acts will cause a serious injustice, where the governments acts go beyond mere negligence and constitute affirmative misconduct such as is the situation here,and where the public interest requires some minimial standard of decency, honor, and reliability in their dealings with their government. Wagner

v. Director Federal Emergency Management Agency, 847 F2nd 515 (Ninth Circuit 1988)

The United States Supreme Court has held that a party may recover damages where the government failed to act in accordance with statutory requirements. Logan v. Zimmerman, 455 U.S. 422 (1982); Ruckelhaus v. Monsanto Co. 104 S. Ct. 2862 (1984);

In Ruckelhaus v. Monsanto, supra, the Court pointed out that the right to exclude others is one of the most "essential sticks" in the "bundle of rights that are commonly characterized as property". Ruckelhaus, Id. pp. 838.. During the 1987 Term of the Claims Court, Zuni Tribe v. United States,

12 Cl. Ct. 641 (1987) was decided. Zuni Tribe, supra, is controllingly significant in that the Claims Court held there that certain acts and omissions by the United States effected a taking of land from the Zuni Indian Tribe. Zuni, supra, is on all Four's with appellant's Case. Factually, and in appellant's case, governmental omission, that is, failure to timely and properly record documents which occasioned appellant's loss, was the singular act of effecting a taking of valuable lode mining claims.

This court has held that a party may recover damages where the government failed to act in accordance with statutory requirements. Logan v. Zimmerman, 455 U.S. 422 (1982)

Restatement on Torts (2nd) # 440 indicates that unforeseeable superceding concurring causes are intervening causes which are so substantially responsible for the ultimate injury that such superceding causes cut off the liability of the preceding actors and transfer the liability to the superceding event and actors. (In this case they happen to be the same agency - the BLM) The unforeseen superceding event in this situation occured when the Washington Chromium decision was not followed whereby the December 1983 documents were not back dated as they should have been - nunc pro tunc -- as of the date they were originally received , October 18, 1979. Thus a new cause of action was created as

of December 1983 by the unforeseen superceding and concurring breach of duty by the BLM filing and recording clerk in the Reno Nevada offices of the BLM in December 1983 per the Washington Chromium decision.

Therefore it is obvious that the required administrative claim was filed within two years of the cause of action . The Federal Court in Nevada has subject matter jurisdiction and the appellant's complaint should not have been dismissed.

Furthermore the dismissal of the appellant's complaint based upon the erroneous application of the statute of limitations, precluded the appellant from

proceeding on its claim against the government and constitutes a denial of procedural due process and a compensable taking and should be reversed.

CONCLUSION

For the reasons set forth , a writ of certiorari should issue to review the judgment of the Ninth Circuit Court .

Respectfully submitted,

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ALASKA PACIFIC, INC. Plaintiff, vs. THE UNITED STATES OF AMERICA; THE SECRETARY OF THE INTERIOR; as an agent of the UNITED STATES OF AMERICA; THE DEPARTMENT OF THE INTERIOR OF THE UNITED STATES OF AMERICA; and THE BUREAU OF LAND MANAGEMENT, an agency of the UNITED STATES OF AMERICA; and DOES 1-20, Defendants.	CASE NO. CV-S-85-1016-RDF ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

I. Introduction

The facts of this case have been adequately addressed in this court's previous orders--Order Granting Defendants' Motion to Dismiss, entered October 27, 1986 ("October 27, 1986 Order"); and Order Re: Plaintiff's Motion to Amend Judgment, entered March 27, 1987

("March 27, 1987 Order")--and need not be restated here. However, a brief review of this court's previous orders is appropriate to establish the context of the present Motion.

The October 27, 1986 Order dismissed each of the Seven Counts in plaintiff's First Amended Complaint. On November 7, 1986 plaintiff filed a Motion to Alter or Amend the Judgment based on newly discovered evidence and on a violation of Local Rule 140-9. Because the court believed that there had been an inadvertent violation of Local Rule 149-9, it partially granted plaintiff's motion and on March 27, 1987, reinstated those counts in plaintiff's First Amended Complaint which were affected by the violation--Counts Six and Seven. The order was without prejudice to the right of the defendants to bring a subsequent

motion for dismissal or for summary judgment.

On April 21, 1987, defendants filed a Motion to Dismiss or for Summary Judgment. The Motion was made with respect to both Count Six and Count Seven. However, in a previous Order signed by this court and dated May 12, 1986, the parties stipulated to the striking of Count Six from plaintiff's First Amended Complaint.[1] This leaves only Count Seven--promissory estoppel--before the court on this motion.

II. Defendants' Motion to Dismiss or for Summary Judgment

Plaintiff's suit is against the United States. It is axiomatic that the United States cannot be sued without its consent. United States v. Mitchell, 463 U.S. 206, 212 (1983). The court

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[1]In the May 12, 1986 stipulation, the parties also stipulated to the dismissal of the Secretary of the Interior as a defendant in this action.

reiterates this point at the outset to make clear that even if plaintiff states a cause of action, it must also demonstrate that the United States has waived its immunity with respect to that cause of action or is otherwise subject to suit.

A. Plaintiff's Claim

Plaintiff asserts that:

1) defendants' actions caused plaintiff to believe that the mining claims had been properly filed;

2) defendants' knew or should have known that plaintiff would rely on defendants' actions; and

3) plaintiff did rely, to its detriment, on defendants' actions.

Plaintiff's First Amended Complaint, at pp. 7-8.

Plaintiff's position is that this satisfies the elements of promissory estoppel and that plaintiff should be able

to recover damages from the defendant based on this estoppel cause of action.

The court believes that it is helpful to review each of the potential bases for plaintiff's claim against the United States.

1. Misrepresentation

The United States has waived its immunity with respect to tort claims via 28 U.S.C. § 2674 which provides that "[T]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual in like circumstances, . . ." However, 28 U.S.C. § 2680(h) excerpts from this waiver of immunity "[A]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or

interference with contract rights: . . ." (emphasis added). This includes claims arising out of negligent, as well as willful, misrepresentation. United States v. Neustadt, 366 U.S. 696, 702 (1961).

In its moving papers plaintiff expressly states that its claim is not based on misrepresentation and urges the court not to characterize it as such. (Plaintiff's Opposition to Defendant's Motion to Dismiss or for Summary Judgment at pp. 5-6). In so doing plaintiff implicitly admits that its claim would be barred if it were based on misrepresentation.

2. Contract

The United States has also waived its immunity with respect to certain contract claims via 28 U.S.C. § 1346(a) ("Tucker Act") which provides that:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> (1) [Civil action for recovery of taxes]
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . . (emphasis added)

Plaintiff's express and implied contract claims were dismissed in the court's October 27, 1986 Order for lack of jurisdiction because plaintiff's claim exceeded the district court's jurisdictional amount limitation.

The Ninth Circuit Court of Appeals has explained that the theory of "promissory estoppel" is an independent

right to recover and is not an "express or implied-in-fact contract" theory. Jablon v. United States, 657 F.2d 1064, 1070 (9th Cir. 1981). This means that promissory estoppel is not within the Tucker Act's waiver of immunity--the Tucker Act only allows actions founded upon express or implied contracts. While it is conceivable that promissory estoppel is the equivalent of an "implied-in-law" contract (though this court does not so hold), the Tucker Act does not confer jurisdiction over "implied-in-law" contracts. See, Knight Newspapers, Inc. v. United States, 395 F.2d 353 (6th Cir. 1968).

3. Promissory Estoppel

Traditionally the rule has been that estoppel cannot be asserted against the United States. Utah Power & Light Co. v. United States, 243 U.S. 389 (1917); Pine

River Logging Co. v. United States, 186 U.S. 279 (1902); United States v. Ruby, 588 F.2d 697 (9th Cir. 1978). However, the rule is not absolute and estoppel has been successfully asserted against the United States in several cases. Moser v. United States, 341 U.S. 41 (1951); Immigration and Naturalization Service v. Nibi, 414 U.S. 5 (1973); United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970). In the cases allowing estoppel to be asserted against the United States, it has been "equitable estoppel" rather than "promissory estoppel" that has been allowed.

> The difference between the doctrines can best be explained by observing that promissory estoppel is used to create a cause of action, whereas equitable estoppel is used to bar a party from raising a defense or objection it otherwise would have, or from instituting an action which it is entitled to institute.

> Promissory estoppel is used as a sword, and equitable estoppel is used as a shield.

Jablon v. United States, 657 F.2d at 1068.

In the present case, estoppel is being asserted to create a cause of action or a right to recover; therefore, plaintiff properly characterizes its claims as one for "promissory estoppel." At this point is has no other claims.

As mentioned above, the cases allowing estoppel to be asserted against the United States involve "equitable estoppel"--equitable claims asserted to prevent the government from asserting its own theory or to stop the government from asserting a theory which would undermine plaintiff's cause of action. Jablon, at 1068; See, Cooper v. Bell, 628 F.2d 1208 (9th Cir. 1980); Sun Il Yoo v. Immigration & Naturalization Service, 534 F.2d 1325 (9th Cir. 1976); United States v. Wharton,

514 F.2d 254 (9th Cir. 1975). At oral argument plaintiff's able counsel referred this court to United States v. Georgia Pacific, 421 F.2d 92 (9th Cir. 1970), to support the proposition that estoppel has been successfully asserted against the United States where the government's conduct is something less than affirmative misconduct. The court does not dispute this point. However, like the other cases allowing estoppel to be asserted against the United States, Georgia Pacific involves "equitable" rather than "promissory" estoppel.

The plaintiff has cited no cases allowing money damages against the United States on a promissory estoppel theory, See also, Jablon, 657 F.2d at 1069, n.9, and this court has found only limited authority for such recovery. Reamer v. United States, 532 F.2d 349 (4th Cir.

1976); Kaye v. United States, 467 F.2d (D.C. Cir. 1972); Putman Mills Corp. v. United States, 432 F.2d 533 (2d Cir. 1970); and Gilford v. United States, 573 F.Supp. 96 (D. Colo. 1983). It appears that the traditional rule of not allowing estoppel to be asserted against the United States has not been modified with respect to promissory estoppel. Schuhl v. United States, 3 Cl.Ct. 207 (1983).

B. The Court's Ruling

This court sympathizes with plaintiff's position. Had plaintiff's claims been timely and diligently asserted it may very well have prevailed on the merits. Unfortunately, the law, as it now exists, does not allow the court to rescue plaintiff from its plight.

It may well be that the policies and equities which justified modification of the traditional rule with respect to

"equitable" estoppel may also warrant modification of that same rule with respect to "promissory" estoppel--particularly on facts like those presented in this case. However, this court feels constrained by the decisions of the Ninth Circuit Court of Appeals and declines plaintiff's invitation to so modify the traditional rule.

IT IS HEREBY ORDERED that defendants' motion to dismiss be granted.

IT IS SO ORDERED.

This 15th day of December, 1987.

_____

DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ALASKA PACIFIC, INC. Plaintiff, v. THE UNITED STATES OF AMERICA, et al., Defendants.	CV-LV-85-1016-RDF ORDER RE: PLAINTIFF'S MOTION TO AMEND JUDGMENT

By order dated October 27, 1986, this court granted the United States' motion to dismiss. Plaintiff now brings a timely-filed motion to amend the judgment, pursuant to F.R.C.P. 59(e). Motions to amend or alter judgments are addressed to the discretion of the court. Huff v. Metropolitan Life Ins. Co., 675 F.2d 119, 122 (6th Cir. 1982); 11 C. Wright, A. Miller & M. Kane, Federal Procedure and Practice §2803 (1973).

The plaintiff's motion rests essentially on two grounds: (1) newly

discovered evidence, and (2) the court violated Local Rule 140-9 by not affording the plaintiff an opportunity to present or argument. For reasons set forth below, the motion is denied except as to Counts V and VI of the Amended Complaint. The order of October 27, 1986, will be amended to the extent that Counts VI and VII will be reinstated.

1. Newly Discovered Evidence.

Plaintiff contends that its negligence claim, Count I of the Amended Complaint, under the Federal Torts Claims Act (FTCA) should be reinstated on the basis that it discovered new evidence which "refutes conclusions expressly made by this Court in its Judgment granting the Motion to Dismiss."

A motion to amend or alter a judgment on the ground of newly discovered evidence must show that, although exercising due diligence, the movant failed to discover the evidence and, in addition, the newly discovered evidence consists of facts which existed at the time of the judgment. Contempo Metal Furn. of Cal. v. East Texas Motor Freight Lines, Inc., 661 F2d 761, 764 (9th Cir. 1981). Moreover, the newly discovered evidence must be material and likely to produce a different result.

The plaintiff's new evidence consists of an affidavit of Richard A. Harris and a Short Transmittal Note from the Bureau of Land Management (BLM) to Last Chance Mining Company, Inc. (Alaska-Pacific's predecessor in interest on the mining claims in issue). The affidavit is dated April 26, 1985, and was prepared by Mr.

Harris, an attorney, as an exhibit to his client's motion to dismiss an action brought against it by Alaska-Pacific. Mr. Harris states that he examined BLM records concerning the mining claims in issue, and "[t]here exists a document entitled 'Statement of Ownership Pursuant to Title 43' signed by Gregory J. Chachas [the principal of Alaska-Pacific] on October 15, 1979. The document described the Pioneer and Pioneer 2-22 lode claims. At the bottom of the statement is U.S. Certified Mail Postal Receipt No. 873610 stamped with the date of October 16, 1979. The statement itself bears a BLM-dated stamp of December 7, 1983." (Declaration of Richard W. Harris, Ex. 1 to Plaintiff's Motion at ¶5a). The transmittal note is dated November 15, 1979, and informs Last Chance that its 1978 Proof of Labor was unnecessary and being returned. Plaintiff

contends that the transmittal note and affidavit show "that Mr. Chachas reasonably believed all was well with his claims as late as December 3, 1°983."

The new documents are immaterial and would not have affected this courts decision to dismiss the negligence count on statute of limitations grounds. The affidavit is cumulative. The same facts were presented by the parties in their moving and opposing papers. The transmittal note does not address the pivotal question of whether Mr. Chachas discovered the failure to record more than two years prior to filing an administrative claim under the FTCA. Furthermore, plaintiff's position that Mr. Chachas did not discover a problem with the claims until December 3, 1983, is inconsistent with its statements in its

opposing papers to defendants' motion to dismiss. There plaintiff stated that it was "[l]ate in the fall of 1982, when the BLM first returned, unstamped, the assessment affidavits, the Plaintiff was then, for the first time, on notice that he had, in fact, a possible problem." Opposition at 7.

2. Failure to Grant a Hearing Pursuant to Local Rule 140-9.

Plaintiff asserts that the court's failure to grant oral argument violated Local Rule 140-9 and is grounds for amendment.

In its motion to dismiss, the United States challenged this court's subject matter jurisdiction over the plaintiff's claims. Once the existence of subject matter jurisdiction is challenged, the

burden of establishing it rests with the party asserting jurisdiction. If a motion is a facial attack on jurisdiction--the truth of the jurisdictional facts alleged by the plaintiff is challenged--the court may review any competent evidence, such as affidavits, deposition testimony and the like, in order to determine the factual dispute. Biotics Research Corp. v. Heckler, 710 F.2d 1375 (9th Cir. 1983). Any factual dispute upon which the existence of jurisdiction may turn is for the court alone, and not a jury, to determine. Gough v. Rossmoor Corp., 487 F.2d 373 (9th Cir. 1973), cert. denied, 429 U.S. 857 (1976). In contrast to Rule 12(b)(6) motions, review of documents outside the pleading is Rule 12(b)(1) motions does not convert them to summary judgment motions. Therefore, those claims

dismissed pursuant to Rule 12(b)(1) were not subject to Local Rule 140-9.

As to Count I of the Amended Complaint, negligence, the Government made a facial attack on the jurisdictional facts asserted by the plaintiff. It was necessary to determine when Mr. Chachas knew or should have known he had a claim against the Government, because a filing of a timely claim with the appropriate federal agency is jurisdictional in nature and must be satisfied before a suit may be maintained. Bailey v. United States, 642 F.2d 344, 346 (9th Cir. 1981). This determination is for the court alone to make and it may rely on any competent evidence in making the determination. Review of material outside the pleadings did not convert this 12(b)(1) determination to a summary judgment

motion, oral argument was not required, and dismissal of the plaintiff's negligence claim will stand.

Counts II and V charge a taking of property without due process of law. Title 28, section 1346(a)(2), provides that federal district courts and the Court of Claims have concurrent jurisdiction in any "civil action or claim against the United States, not exceeding $10,000 in amount, founded upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . . 28 U.S.C. §1346(a)(2) (emphasis added). The Court of Claims has exclusive jurisdiction when claims against the United States exceed $10,000. Myers

v. United States, 323 F.2d 580 (9th Cir. 1963). Plaintiff is praying for an amount substantially in excess of $10,000; therefore, the Court of Claims is the proper forum within which to bring Counts II and V and, accordingly, they were properly dismissed.

On the same grounds, Count III, breach of an implied contract, see 28 U.S.C. §1346(a)(2); Army & Air Force Exchange Service v. Sheehan, 456 U.S. 728, 734 n.5 (1982), and Count IV, inverse condemnation, see Blanchette v. Connecticut General Ins. Corp, 419 U.S. 102 (1974); Myers v. United States, supra, were properly dismissed.

The Government's motion to dismiss Counts VI and VII, violation of 42 U.S.C. §1983 and promissory estoppel,

respectively, was based upon Rule 12(b)(6), rather than 12(b)(1). As such, review of material outside the pleadings converted this portion of the motion to one for partial summary judgment and oral argument on these counts was required by Local Rule 140-9 prior to dismissal. Therefore, these two counts will be reinstated without prejudice to the right of the United States to bring a subsequent motion for dismissal or summary judgment.

ORDER

The plaintiff's motion to amend or alter, pursuant to F.R.C.P. Rule 59, is GRANTED in the FOLLOWING RESPECTS:

(1) Count VI of the Amended Complaint, violation of 42 U.S.C. §1983 claim, is reinstated.

(2) Count VII of the Amended Complaint, promissory estoppel claim, is reinstated.

The plaintiff's motion is DENIED in all other respects.

DATED: March 26, 1987.

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DISTRICT JUDGE

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ALASKA PACIFIC, INC.	)	CV-LV-85-1016-RDF
	)	
Plaintiff,	)	
	)	
v.	)	ORDER GRANTING DEFENDANTS' MOTION TO DISMISS
	)	
THE UNITED STATES OF AMERICA, et al.,	)	
	)	
Defendants.	)	

FACTUAL BACKGROUND

In 1976, Congress passed the Federal Land Policy and Management Act (FLPMA), codified at 43 U.S.C. §§ 1701-1784. Section 314 of the Act establishes a federal recording system, which as two general requirements for those wishing to retain their unpatented mining claims. First, notices of location for the claims must have been initially registered with the Bureau of Land Management (BLM) before October 22, 1979. 43 U.S.C. §1744(b).

Second, in the year of the initial recording, and annually in all subsequent years, the holder of the claims must file with state officials and the BLM a notice of intention to hold the mining claims, an affidavit of assessment work performed on the claim, or a detailed reporting form. 43 U.S.C. §1744(a). Failure to comply with either of these requirements is deemed to "conclusively constitute an abandonment of the mining claim." 43 U.S.C. §1744(c).

Plaintiff, Alaska Pacific, Inc., owned 50% of a group of unpatented mining claims in the Little Bald Mountain Mining District, white Pine County, Nevada. According to the complaint, plaintiff's predecessor in interest sent the BLM office in Reno, Nevada, by certified mail, all documents necessary for initial

location recordation on October 16, 1979, and thereby complied with 43 U.S.C. §1744(c). However, the initial notice of location was not recorded by the October 22, 1979 deadline.

The plaintiff filed annual assessments of work on the claims in 1980 and 1981. The BLM asserts that the annual assessments were returned because there was no initial notice of location filed for the mining claims, and the fact that the assessments were resubmitted by the plaintiff in December of 1983 seems to support this contention; plaintiff asserts he did not become aware that there was a problem with the initial filing in 1980 or 1981 and it was not until "late 1982 that there was any problem with the filing of 1979." Plaintiff's Opposition at 7. According to the plaintiff, it was not

until "(l)ate in the fall of 1982, when the BLM first returned, unstamped, the assessment affidavits, [that] the plaintiff was . . . aware for the first time, on notice that he had, in fact, a possible problem." Id.

There were several phone conversations between the plaintiff and the BLM concerning the Pioneer claims in 1983. Plaintiff was informed by the BLM that evidence of timely filing of the 1979 initial notices of location should be submitted, and if the evidence was sufficient, the BLM would issue a decision allowing the initial filing. On December 7, 1983 the BLM received a letter and documents from the plaintiff concerning the initial filing. On December 13, 1983 the BLM requested

further documents and fees which were received on December 27, 1983.

At the same time as the as the controversy with the BLM was occurring, plaintiff was involved in litigation with another mining company concerning ownership of the Pioneer claims. According to the plaintiff, as soon as the United States v. Locke, ___ U.S. ___, 85 L.Ed.2d 64 (1985), case was decided the Pioneer claims were quitclaimed to the other mining company because plaintiff's belief that the Locke decision expelled any rights it had in the claims. This occurred on May 13, 1985. Immediately after receiving the quitclaim deed, the second mining company abandoned the claims.

This action has been brought under the Federal Tort Claims Act (FTCA), 28 U½S½C½ §1346(b). The gravamen of this action is that the BLM failed to record the plaintiff's initial notices of location of the Pioneer claims in a timely manner prior to October 22, 1979. Defendants have moved this court to dismiss the action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Fed. Rule Civ. P. 12(b)(1) and (6).

DISCUSSION

In evaluating the sufficiency of a plaintiff's complaint on a motion to dismiss, the complaint shall not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claims which would

entitle him to relief. Scheur v. Rhodes, 416 U.S. 232, 236 (1974); Conely v. Gibson, 355 U.S.41, 45-46 (1957). Any doubt as to the character of the claim must be resolved in favor of the pleader, and the allegations of the complaint must be accepted as true.

In order to bring an action under the FTCA, 28 U.S.C. §1346(b), a plaintiff must comply with 28 U.S.C. §2401 (b), which states that:

> [A] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. (emphasis added).

The government contends that in the instant case plaintiff failed to file an administrative claim with the BLM within the two-year limitations period.

The requirement of filing a timely claim with the appropriate federal agency is jurisdictional in nature and must be satisfied before a suit under the FTCA may be maintained. Bailey v. United States, 642 F. 2d 344, 346 (9th Cir. 1981); Canton v. United States, 495 F. 2d 635, 637 (9th Cir. 1974). The general rule under the FTCA is that a claim accrues at the time of the injury for most torts. Davis v. United States, 642 F. 2d 328, 330 (9th Cir. 1981), cert. denied, 455 U.S.919 (1982). In certain cases, usually those involving medical malpractice or those injuries in which the causes are not

readily apparent because the physical manifestations of the injuries take extended periods to appear, the claim does not accrue until the plaintiff knew of or in the exercise of reasonable diligence should have known of both the injury and the cause. United States v. Kubrick, 444 U.S. 111, 122 (1979).

Regardless of which accrual rule is applied to the plaintiff's action, the general or Kubrick rule, plaintiff failed to file an administrative claim within a two-year limitation period as required by 28 U.S.C. §2401 (b). If the general accrual rule is applied, plaintiff's action accrued on October 27, 1979, the last available date by which to record a notice of location.

If the Kubrick rule is applied, the last day to file an administrative claim was sometime in late 1984. As the plaintiff has stated, the discovery that there was a problem with the initial 1979 filing occurred in late 1982. At that point, plaintiff was aware of both his injury, loss of the Pioneer claims, and its alleged cause, failure of the BLM to properly record. Once on notice of the injury and likely cause, plaintiff must file an administrative claim within two years. Plaintiff filed an administrative claim with the BLM on June 11, 1985, more than two years after the latest possible accrual, thus, plaintiff's action is barred for failure to comply with 28 U.S.C. §2401(b).

In an effort to avoid application of the limitations statute, plaintiff asserts

that he did not become aware that the notices of location were not filed until December 13, 1983, though he realized there was a problem with the recordation in late 1982. Further, it was not until the Locke decision in April 1985 that the nonrecordation became irreversible and plaintiff's injuries fixed. So, under plaintiff's theory the limitations period began to run either on December 13, 1983 or the date of the Locke decision, and the administrative claim was timely filed under either.

As stated above, a claim accrues when a plaintiff has been injured and is aware of the injury and probably cause. It is not necessary, as plaintiff would have this court believe, that the plaintiff be certain of his injuries, cause, and damages before the limitations period is

set in motion. Lack of knowledge as to an injuries permanence, extent, and ramifications does not toll the statute of limitations under the FTCA. Gustavson v. United States, 655 F. 2d 1034, 1036 (10th Cir. 1984). Finally, there are no grounds to toll the statute of limitations. The BLM made efforts to determine whether plaintiff had properly filed in 1979 and accepted filing fees in December of 1983. However, absent claims of fraudulent concealment, or other forms of conduct which may be recognized as grounds for equitable tolling of the statute, these actions by the BLM do not toll the statute. United States v. Dyniewica, 742 F. 2d 484, 487 (9th Cir. 1984), citing, Borzeka v. Heckler, 739 F. 2d 444, 448 n. 3 (9th Cir. 1984). No sufficient grounds for tolling the statute have been asserted by the plaintiff.

Since the plaintiff failed to file an administrative claim within the FTCA limitations period, this court lacks subject matter jurisdiction and the action must be dismissed.

ORDER

Defendants' motion to dismiss for lack of subject matter jurisdiction is granted.

DATED: October 27, 1986.

DISTRICT JUDGE

A-41

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA PACIFIC INC
PLAINTIFF APPELLANT No 88-1584
-v-

UNITED STATES OF AMERICA CV LV 1016 RDF
DEFENDANT APPELLEES

Appeal from THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
ROGER FOLEY , SENIOR DISTRICT JUDGE, PRESIDING

ARGUED AND SUBMITTED JANUARY 13, 1989
SAN FRANSISCO, CALIFORNIA

Before: NORRIS , NOOMAN, AND LEAVY

For the reasons stated by the district court in its orders of October 28, 1986, March 26, 1987 and December 15, 1987, the judgment in favor of the Defendant Appellee United States of America is AFFIRMED.

Filed April 18, 1989

/s/ Cathy Catterson , Clerk

U.S. Court of Appeals